Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 80-578

IN THE

Supreme Court of the United States

October Term 1980

HARRY LLOYD MILHAN,

Petitioner,

vs.

MARY LEE MILHAN,

Respondent.

ADDITIONAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Mary Lee Milhan, Petitioner, Respondent and Cross-Appellant, v. Harry Lloyd Milhan, Respondent, Appellant and Cross-Respondent. 2 Civil No. 55276. (Super.Ct.No. 84183).

Filed: Sept. 10, 1979.

APPEAL from judgment of the Superior Court of Santa Barbara County. Hon. Arden T. Jensen, Judge. Reversed.

Messrs. Price, Postel & Parma, Gary R. Ricks, J. Terry Schwartz, for Appellant.

Messrs. Cavalletto, Webster, Mullen & McCaughey, Jeffrey C. Nelson, for Respondent.

Husband appeals a trial court judgment ordering a community division of his Navy retirement pay and of the cash surrender value of two military life insurance policies. The judgment was entered pursuant to a decision and remittitur of the California Supreme Court, which had reversed the trial court's earlier adjudication that these assets were husband's separate property. (*In re Marriage of Milhan* (1974) 13 Cal.3d 129, cert. den. (1975) 421 U.S. 976.) Wife cross-appeals the judgment on the ground that husband's Veterans Administration disability benefits should also have been classified and divided as community property.

The parties were married in 1944, following husband's graduation from the United States Naval Academy. In November 1965 husband retired from the Navy (10 U.S.C., § 6323), and thereafter the parties took up residence in California. Wife commenced divorce proceedings in 1968. In February 1970 the trial court dissolved the marriage, but

reserved jurisdiction to divide the parties' community property at a later time. Each party remarried and entered upon gainful employment. In May 1972 the trial court entered a judgment dividing the community property, which determined that husband's Navy retirement pay and the two military life insurance policies — a National Service Life Insurance policy administered by the Veterans Administration, and a Navy Mutual Aid Association policy administered by the Navy — were husband's separate property. Wife appealed.

In December 1974 the judgment of the trial court was reversed by the California Supreme Court, which declared that wife was entitled to half the Navy retirement pay and also entitled to an offsetting award from other community property for half the value of the military insurance policies. (*In re Marriage of Milhan, supra*, 13 Cal.3d at p. 131, citing *In re Marriage of Fithian* (1974) 10 Cal.3d 592.) In its remittitur the California Supreme Court ordered the trial court to enter judgment consistent with the Supreme Court's opinion.

In February 1976 wife filed a motion in the trial court for entry of judgment in accordance with the decision and remittitur of the California Supreme Court and for restitution of half the retirement pay already received by husband, with interest and attorney's fees. In the trial court's judgment of March 1978, from which this appeal is taken, the court awarded wife half the husband's Navy retirement pay, half the retirement pay received by husband between May 1972 and March 1978, interest on back retirement pay, offsetting community property equal to half the cash value of the military insurance policies, and attorney's fees. Husband's Veterans Administration disability benefits were treated as separate property and not included in the division of community property.

On appeal, wife contends as a preliminary matter that the judgment of March 1978 is not subject to review. We disagree. The judgment of a trial court entered under the direction of a higher court is appealable (*Gore v. Bingaman* (1942) 20 Cal.2d 118); and the doctrine of "the law of the case," which precludes a second appellate determination of legal issues resolved in a prior appeal, does not apply when, as here, intervening judicial and congressional action has clarified contested legal issues. (See *Subsequent Injuries Fund v. Ind. Acc. Com.* (1960) 53 Cal.2d 392, 395; *Standard Oil v. Johnson* (1942) 56 Cal.App.2d 411, 415-416.) We therefore turn to the merits.

1. *Navy Retirement Pay.* In 1974 when the California Supreme Court rendered its decision in the cause at bench, the leading case on community property status of military retirement pay was *In re Marriage of Fithian* (1974) 10 Cal.3d 592. Fithian, a former Marine, claimed the federal Supremacy Clause (U.S. Const., art. VI, cl. 2) protected his retirement pay from the operation of California's community property laws. But the California Supreme Court found a lack of intent by Congress to preclude community division of military retirement benefits. It rejected Fithian's contention that community division of his retirement benefits would constitute an impermissible attachment, and it concluded that military retirement pay was a community asset divisible between the spouses on dissolution of the marriage to the extent earned during the marriage.

More recently, however, the United States Supreme Court in January of this year reversed a California Supreme Court decision which had applied California's community property laws to retirement benefits payable under the Railroad Retirement Act (45 U.S.C., §§ 231 et seq.). The United States Supreme Court, in ruling that no community interest attached to an employee's benefits payable under the Act,

found federal preemption in the allocation of a federal entitlement, rejected the distinction drawn by the California Supreme Court between a garnishing creditor and a "present owner" spouse, and concluded that a community award to the nonemployee spouse of half her husband's retirement benefits impermissibly interfered with the congressional intent expressed in the Act's anti-attachment provision (45 U.S.C., § 231m) to ensure that the employee spouse would be the sole recipient of employee benefits. The court noted that while Congress had amended the Social Security Act in 1975 to allow garnishment of otherwise nonattachable federal benefits to collect child support and alimony (42 U.S.C., § 659), in a further amendment in 1977 it specifically excluded division of community property from its definition of alimony (42 U.S.C., § 662(c)). The court's opinion specifically rejected the theory that federal allocation of benefits could be circumvented by an award to the nonemployee spouse of other community property to offset the loss of community interest in the federally-protected asset. (*Hisquierdo v. Hisquierdo* (1979) .... U.S. .... , 59 L.Ed.2d 1, 8, 12-14.)

Hisquierdo is directly relevant to the issue here — whether a married naval officer's retirement pay becomes quasi-community property when the couple takes up residence in California — in that under the doctrine of federal sovereign immunity, military retirement pay is, and always has been, nonattachable. (*Buchanan v. Alexander* (1846) 45 U.S. 20; *Applegate v. Applegate* (1941) 39 F.Supp. 887; *Arnold v. United States* (1971) 331 F.Supp. 42.) In *Buchanan v. Alexander, supra,* the United States Supreme Court, in holding that a creditor could not attach or garnish a Navy seaman's wages in a state court, pointed out that "the funds of the government are specifically appropriated to certain national objects," and state process which "di-

verted or defeated'' such appropriations must defer to federal allocation.

As in the instance of railroad retirement benefits, recent amendments to the Social Security Act indicate congressional intent to protect military retirement pay from the operation of state community property laws. The 1975 amendment (45 U.S.C., § 659) permits attachment of a serviceman's retirement benefits to enforce alimony and child support obligations, but the 1977 amendment makes it clear that this provision does not apply to community property obligations. That statute declares that alimony

> ''. . . does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.'' (42 U.S.C., § 662(c).)

Congress could have recognized a spouse's community property interest in service retirement benefits had it chosen to do so. In *Hisquierdo, supra,* the United States Supreme Court noted that in 1978 Congress enacted special legislation to permit garnishment of a civil servant's retirement benefits for community property purposes (*Hisquierdo, supra,* 59 L.Ed.2d at p. 16, 5 U.S.C., § 8345(J); see also *In re Marriage of Orr* (1979) 95 Cal.App.3d 561). But Congress has enacted no comparable provision allowing garnishment of a former serviceman's retirement pay for community property purposes, perhaps in recognition of the disruptive effect varying state laws might have upon a mobile service population.

We conclude that in the light of the recent cases and statutes discussed above, military retirement pay remains the separate property of the former serviceman to whom it is payable.

2. *Military Insurance Policies.* In 1950 the United States Supreme Court in *Wissner v. Wissner*, 338 U.S. 655, held that an order requiring the beneficiary of a National Service Life Insurance policy (38 U.S.C., §§ 701 et seq.) to pay half the proceeds of the policy to a deceased serviceman's spouse as community property was invalid under the Supremacy Clause because it impermissibly interfered with Congress' intent to assure that the serviceman alone has the right to choose the beneficiary of his policy (formerly 38 U.S.C., § 802(g), now 38 U.S.C., § 717(a)). In 1974 the California Supreme Court interpreted the *Wissner* decision as precluding only those applications of the state's community property laws that would frustrate express congressional intent (such as requiring the insured to surrender the policy and pay half the proceeds to his spouse), and as permitting the state to otherwise apply its community property laws to achieve an equitable division of the spouses' property on dissolution of marriage. (*In re Marriage of Fithian, supra,* 10 Cal.3d at pp. 597-598.) The California Supreme Court adhered to this interpretation when the present cause came before it in 1974 (*In re Marriage of Milhan, supra,* 13 Cal.3d 129), and it ruled that a serviceman's spouse could be compensated for the loss of her community interest in military insurance policies by an offsetting award of other property. But in 1979 the United States Supreme Court in *Hisquierdo v. Hisquierdo, supra,* 59 L.Ed. 1, 14-16, specifically disapproved the ruling of the California Supreme Court in the instant cause and specifically rejected the doctrine of remedial offset. An offsetting award under the *Milhan* doctrine, said the court, "would upset the statutory balance and impair [the retired spouse's] economic security just as surely as would a regular deduction from his benefit check." (*Hisquierdo*, p. 15.) A trial court's award of half the cash value of military insur-

ance policies to a spouse would effectively nullify the beneficiary election specifically given the insured serviceman by Congress and would frustrate congressional intent to assure members and veterans of the armed services a uniform and inexpensive form of life insurance. (*Wissner v. Wissner, supra,* pp. 658-659.)

3. *Veterans Administration Disability Benefits.* On cross-appeal, wife contends the trial court erred in failing to classify and divide husband's Veterans Administration disability benefits as community property. We recently addressed this issue *In re Marriage of Orr, supra,* 95 Cal. App.3d 561, and held that Congress intended such benefits to remain the separate property of the disabled spouse (38 U.S.C., § 3101). Accordingly, we find no error in the court's failure to include disability benefits in the division of community property.

4. *Attorney's Fees.* Finally, husband contends the trial court's award to wife of $1,500 in attorney's fees was improper. (Civ. Code, § 4370.) Since our decision upholds the husband's contentions in full, we agree that the trial court's award of attorney's fees to the wife was erroneous.

The judgment is reversed. Costs on appeal to appellant-husband.

CERTIFIED FOR PUBLICATION.

/s/ FLEMING, *ACTING P.J.*
Fleming

We concur:

/s/ COMPTON, *J.*
Compton

/s/ BEACH, *J.*
Beach